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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.----------

M. BROWNING COMBS, ET AL, *Petitioners*

v.

PRINCESS RANOLA JOHNSON, ET AL, *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioners pray that a writ of certiorari issue to review the order and judgment entered in this case on December 6, 1972, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order, judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered December 6, 1972, is set forth in the Appendix, p. 17. The opinion of that Court is not yet reported. The decision of the United States District Court for the Northern District of Texas entered on August 22, 1972, and amended on September 8, 1972, is set forth in the Appendix, p. 24. This decision is not reported. The Court of Appeals for the Fifth Circuit decided the merits in this case, without discussion, based on

its opinion in *Weaver* v. *Board of Public Education of Brevard County, Florida*, 467 F2d 473 (5th Cir. 1972), decided on September 6, 1972, certiorari filed Dec. 4, 1972, 72-818.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on December 6, 1972. Respondents' motion for rehearing and for rehearing en banc on that portion of the Court of Appeals judgment that refused to apply the attorneys' fees portion of Public Law 92-318 (1972) retroactively was denied on February 8, 1973. The jurisdiction of this Court is involved under and pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is there a constitutional basis for reorganization and control of a school system by the federal court, where there is only one neighborhood elementary school within the school district whose primarily black student body resulted from about eighty percent of the students moving into the school zone during or after 1964, the school system having complied with constitutional desegregation standards, Respondents having submitted no evidence of discrimination on the part of the school district?

2. Is operation by a school system of one neighborhood elementary school with a student racial imbalance resulting from voluntary residential housing patterns unconstitutional per se in school districts with history of a dual system despite overwhelming evi-

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dence by the school district of compliance with judicially declared desegregation standards and where there is no evidence by Respondents of discrimination on the part of the school district?

3. Does the burden of proof as to alleged unconstitutional discrimination shift to the parties claiming discrimination when the school district submits evidence of compliance with governing desegregation standards?

4. Where a school district submits evidence of compliance with governing desegregation standards, does Public Law 92-318 (1972) support the award of attorneys' fees in the absence of evidence that elementary school students, assigned to a neighborhood school, were assigned on the basis of geographic attendance areas drawn on a racially discriminatory basis?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment and the Tenth Amendment to the Constitution of the United States of America. It also involves Public Law 92-318 (The Educational Amendments of 1972), Sections 718 and 719, which are as follows:

> Sec. 718. Upon the entry of a final order by a Court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color,

or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Sec. 719. Nothing in this title shall be construed as requiring any local education agency which assigns students to schools on the basis of geographic attendance areas drawn on a racially nondiscriminatory basis to adopt any other method of student assignment.

STATEMENT OF THE CASE

1. Proceedings in the District Court

This suit was originally filed on August 27, 1971, in the Northern District of Texas. Jurisdiction was asserted by respondents under Title 28 U.S.C., Section 1331, as an action arising under the Fourteenth Amendment to the Constitution of the United States. Jurisdiction was also alleged pursuant to Title 28 U.S.C., Sections 1343 (3) and (4), and 42 U.S.C., Sections 1981, 1983, 1988, 2000 c-8 and 2000d. The case was alleged to be a class action pursuant to Rule 23(b) (2) of the Federal Rules of Civil Procedure.

The facts in this case were essentially undisputed. The case boiled down to whether or not the evidence of only one neighborhood elementary school within the school district (Dalworth, historically black), with

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a primarily black student body, precluded the school district from being "unitary" in the constitutional sense, where it was uncontroverted that parents of about eighty percent of the students moved into that attendance area after 1964, all schools in the district at that time being open to all students without regard to race, there being no evidence of housing discrimination within the district and no allegation thereof.

The District Court found that the Grand Prairie Independent School District operated a unitary school system except for the Dalworth Elementary School. The Court felt bound by the decisions of the United States Court of Appeals for the Fifth Circuit in *Cisneros* v. *Corpus Christi Independent School District*, 467 F2d 142 (1972) and *Flax* v. *Potts*, 464 F2d 865 (1972), certiorari denied, ...U.S....., 34 L Ed 2d 299 (1973), to hold that "residential patterns can be no defense to the existence of one race schools in a system which has never been operated in a unitary manner." The District Court took jurisdiction, ordered clustering of Dalworth with two other schools, ordered the school district to provide the necessary transportation, and in an amended judgment awarded attorneys' fees to the attorneys for Respondents.

2. The Decision of the Court of Appeals (1972)

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit on grounds that the District Court erred in holding the Grand Prairie Independent School District to be guilty of unconstitutional discrimination because of the racial make-up of

the Dalworth Elementary School; that Respondents had failed to produce evidence of discrimination by the school district that would entitle Respondents to judgment, and that the award of attorneys' fees to Respondents under the circumstances was improper.

The Court of Appeals affirmed the judgment of the trial court in part, vacated the judgment in part and remanded on December 6, 1972.

The school district's case on the merits was summarily disposed of by the Court of Appeals by reference to *Weaver* v. *Board of Public Education of Brevard County, Florida*, 467 F2d 473 (1972), certiorari filed Dec. 4, 1972, 72-818.

The Court of Appeals vacated that part of the District Court's judgment that awarded attorneys' fees for legal services prior to July 1, 1972, the effective date of the Education Amendment Act of 1972. Respondents moved for a rehearing en banc on the portion of the appellate court's judgment that refused to apply the attorneys' fees portion of Public Law 92-318 (1972) retroactively. Respondent's motion for rehearing and for rehearing en banc was denied on February 8, 1973.

There is nothing in the brief reference to *Weaver*, supra, by the Court of Appeals, nor in the *Weaver* opinion, indicating that the racial make-up of the offending school in *Weaver* was not the result of state imposed segregation, the situation in Petitioners' case.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit currently applies an unconstitutional standard for the exercise of federal judicial intervention into the affairs of school systems within its jurisdiction, of which practice, Petitioners are victims. The Supreme Court of the United States should secure the benefits of the Tenth Amendment to the Constitution of the United States of America to those school districts, such as Petitioner, that are located under the jurisdiction of the United States Court of Appeals for the Fifth Circuit. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the United States Supreme Court held:

> In seeking to define even in broad and general terms how far this remedial power extends, it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

Such federalism, implicit in *Swann*, is impounded at the level of the Court of Appeals for the Fifth Circuit, e.g. *Cisneros* v. *Corpus Christi Independent School District*, 467 F2d 142 (1972), with only the surface flow from *Swann* (that part dealing with equitable remedial powers of federal courts) being allowed over the spillway for the refreshing of the lower federal courts. The result, in the Fifth Circuit, as in Petitioners' case, is that when Respondents proved

existence of a neighborhood school with a primarily black student body, absent a scintilla of evidence of discrimination, the lawsuit was over insofar as the school district was concerned, except for the raising of money for buses, court costs and attorneys' fees, despite evidence by the school district that it had done all those things required by the Supreme Court.

The Grand Prairie Independent School District had met desegregation requirements demanded of no other section of the nation. It fell victim to the requirement that the lower federal court of this circuit intervene in isolated instances of racial imbalance in neighborhood schools resulting from de facto segregation, and that the Tenth Amendment be ignored in favor of alleged but unproven violation of the Fourteenth Amendment.

Petitioners submit that the action of the District Court in deciding this case without regard to *Swann* resulted in the unconstitutional reorganization by the federal court of the Grand Prairie Independent School District.

The constitutional basis for a federal court's intervention into the operation of a state's public school system was declared by the United States Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), hereinafter referred to as "Brown I." In Brown I, the Supreme Court held that Plaintiffs who . . .

> . . . In each instance . . . had been denied admission to schools attended by white children under laws requiring or permitting segregation

according to race, 'had been' deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

In *Swann* v. *Charlotte-Mechlenburg Board of Education*, 402 U.S. 1 (1971), the United States Supreme Court, from its vantage point of overseeing the segregation lawsuits since Brown I, restated the objection of the federal courts *as limited by the constitutional basis for intervention in school affairs:*

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentration in some schools.

Swann further held:

> . . . It should be clear that the existence of some small number of one-race, or virtually one-race schools within a district is not in and of itself the mark of a system which still practices segregation by law.

The facts in the Grand Prairie Independent School District case are uncontroverted. The student bodies are integrated, faculty and staff are integrated and nondiscriminatory, transportation is integrated and nondiscriminatory, extracurricular activities are integrated and nondiscriminatory and facilities are integrated and nondiscriminatory. Students who are in a majority in any school can transfer freely to any

other school. In addition to the white students normally attending Dalworth, contrary to the finding of the District Court, the record reflects that two white students voluntarily transferred to Dalworth during the preceding year. No person in the Grand Prairie Independent School District is effectively excluded from any school because of race or color.

The Grand Prairie Independent School District operates a unitary school system as that term has been defined by the United States Supreme Court. In *Northcross* v. *Board of Education of Memphis*, 397 U.S. 232, in his concurring opinion, Chief Justice Burger wrote:

> The suggestion that the Court has not defined a unitary school system is not supportable. In *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 24 L Ed 2d, 19, 90 S. Ct. 29 (1969), we stated although perhaps too cryptically, that a unitary system was one 'within which no person is to be effectively excluded from any school because of race or color'.

Petitioners say that the existence within a district of one neighborhood elementary school with a primarily black student body, where about eighty percent of the students moved into the school zone during or after 1964 is not *in and of itself* the mark of a system which still practices segregation.

Certiorari should be granted in this matter because the decision of the Court of Appeals in this case conflicts with the decisions of other courts of appeals. The trial court conceded in this case that were the Grand

Prairie Independent School District located north, rather than south, of the Red River, the border between the 10th and 5th Circuits, the district would probably be entitled to "unitary status". In *Cisneros* v. *Corpus Christi Independent School District*, 467 F2d 142 (5th Cir. 1972) cited by the District Court in this case and by the Court of Appeals in *Weaver* v. *Board of Public Education of Brevard County, Florida*, 467 F2d 473 (5th Cir. 1972), certiorari filed Dec. 4, 1972, 72-818 (the case considered by the Court of Appeals to be dispositive of the merits in this case) the Court said:

> . . . we discard the anodyne dichotomy of classical de facto and de jure segregation.

Those residents of China Town in New York and others who have chosen to live in proximity to those of the same race and send their small children to neighborhood elementary schools must have experienced an involuntary shudder when *Cisneros* held as "unconstitutional" racial and ethnic segregation whether de facto or de jure. Sections of the various states and cities were often settled by differing ethnic groups, whose right under the Tenth Amendment to live together, worship together and attend school together, absent de jure discrimination, without federal direction, has not seriously been infringed except in the Fifth Circuit. Five concurring judges in *Cisneros*, after alluding to the Supreme Court, stated:

> Until its orders are clarion, I will use every effort to despoil any system that permits unconstitutional discrimination in the public schools by

> whatever descriptive semantics — de facto, de jure, state action.

Petitioners pray for a clarion order restoring the benefits of the Tenth Amendment to the school districts under the jurisdiction of the United States Court of Appeals for the Fifth Circuit.

The District Court was guided by the Fifth Circuit requirement to mix racially to a permissable ratio each school in the district without regard to whether or not the student body make-up of a single neighborhood elementary school is the result of de facto rather than de jure segregation. Such requirement is in obvious conflict with Swann and the holdings in other circuits. An example of the conflicting holdings in other circuits is *United States* v. *Board of Education, Ind. S.D. No. 1, Tulsa Co., Okla.*, 459 F2d 720 (10th Cir. 1972), certiorari filed Aug. 3, 1972, 72-190. In that case, involving five primarily black schools, the Court of Appeals held:

> The law of this circuit has been consistently stated by the Court to be that neighborhood school plans where impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance.

Further, the Court said:

> The mere existence of one-race schools, whether black or white, does not establish a constitutional violation. Neither black nor white children have a constitutional right to attend public schools with children of the other race.

The Court of Appeals for the Tenth Circuit went on to say:

> A constitutional violation exists only when it can be shown that the existence of the one-race school and its attendance by children of that race is due to some form of discriminatory state action, however subtle that may be.

So, also, say the other circuits; see *Bradley* v. *Richmond School Board*, 462 F2d 1058 (4th Cir. 1972), certiorari granted, Jan. 15, 1973, 72-550 and *Mapp* v. *Board of Education* (6th Cir. 1972) unreported as yet except in 41 L.W. 2208, decided October 11, 1972. *Mapp* illustrates another conflict between the Court of Appeals for the Sixth Circuit and the Court of Appeals for the Fifth Circuit. In *Mapp*, the Court of Appeals held that the *school system's prior compliance with desegregation requirements shifted the burden of proving that remaining racial imbalances resulted from state or school board discriminatory action from the school to the complaining plaintiffs.*

Another reason that certiorari should be granted is that the Supreme Court should make clear to the lower federal courts that even though the school district has a prior history of operation as a dual system, there is a point, the school district having submitted evidence of compliance with judicially declared desegregation standards and been continually declared in compliance therewith, where the burden shifts to those complaining of discrimination to offer proof thereof other than racial imbalance of the student body in one neighborhood elementary school. The Supreme Court should

give guidance as to whether or not the burden of proof of unconstitutional discrimination shifts to those alleging discrimination, upon proof by the school district of compliance with standard desegregation requirements, there being presently a conflict between the circuits demonstrated by the holding in this case and that of *Mapp* v. *Board of Education*, presently unreported, but found in 41 L.W. 2208, decided October 11, 1972.

Finally, the Court should grant this Petition for Certiorari because Plaintiffs below, claimed and were granted attorneys' fees under Section 718 of Public Law 92-318 (1972), and this Court, by refusing attorneys' fees herein would enforce Section 719 of that same legislation and thereby give effect to the clearly expressed intent of Congress. Section 719 of the Act upon which Respondents rely for attorneys' fees provide as follows:

> Section 719. Nothing in this title shall be construed as requiring any local educational agency which assigns students to schools on the basis of geographic attendance areas drawn on a racially nondiscriminatory basis to adopt any other area of student assignment.

Failure to enforce Section 719 and to require proof that elementary school students assigned to a neighborhood school were not assigned on the basis of geographic attendance areas drawn on a nondiscriminatory basis can only abrogate the above legistlation, encourage barratry, intimidate school districts from the defense of questionable claims brought solely for the

purpose of recovering attorneys' fees — and, in this case, will reward attorneys for Respondents for seeking to do that which the very law on which they rely for attorneys' fees disapproves.

The uncontroverted evidence in this case being that the attendance areas for the Grand Prairie Independent School District were drawn on a racially nondiscriminatory basis, then the rule enunciated in *Fleischman Distilling* v. *Maier Brewing Company*, 386 U.S. 714, 717 (1967), would apply:

> The rule has long been that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted to review the order, judgment and opinion entered December 6, 1972, by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of February, 1973, two copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Edward B. Cloutman, III and Ed J. Polk of Johnson, Polk, Larson, Cloutman & Dixon, 800 Main Street, Dallas, Texas 75202, counsel for the Respondents. I further certify that all parties required to be served have been served.

William A. Barber, Jr.

William A. Barber, Jr.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3030

PRINCESS RANOLA JOHNSON, Etc., ET AL,
Plaintiffs-Appellees,

versus

M. BROWNING COMBS, Superintendent,
Grand Prairie Independent School District, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

---

(December 6, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

CLARK, Circuit Judge: On the merits, the judgment appealed from is due to be affirmed. *Weaver v. Board of Public Education of Brevard County, Florida*, ___ F.2d ___ (5th Cir. 1972) [No. 71-3465, September 6, 1972].

The collateral question as to plaintiffs' entitlement to attorneys' fees below and on this appeal raises a novel issue. The law of the circuit prior to the passage of Section 718 of the Education Amendments Act of

1972[1] made it clear that in school desegregation cases attorneys' fees would be awarded only if the school board was found to have acted in an "unreasonable and obdurately obstinate" manner. *See Williams v. Kimbrough*, 415 F.2d 874 (5th Cir. 1969), *cert. denied* 396 U.S. 1061, 90 S.Ct. 753, 24 L.Ed.2d 755 (1970) [citing *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965)], and *Horton v. Lawrence County Board of Education*, 449 F.2d 793 (5th Cir. 1971). The same rule has been applied in actions under 42 U.S.C.A. § 1982 (which, like *Williams* and *Horton*, were not governed by a statutory provision for attorneys' fees), *Lee v. Southern Homesites Corporation*, 429 F.2d 290 (5th Cir. 1969).

However, the enactment of Section 718 of the Education Amendments Act of 1972 requires that we answer three questions on this appeal: first, does the statute merely codify the existing "unreasonable and obdurately obstinate" standard, or does it set new parameters within which the district court must exercise its discretion; second, if the statute does create a new legal standard, to what degree should that standard be applied retroactively; and third, when is an order a "final order" within the meaning of the statute?

---

[1]Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof,) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

We note at the outset that Section 718 is similar, though not identical,[2] to the provision allowing attorneys' fees to the successful party in an action based on Title II of the 1964 Civil Rights Act.[3] In the leading case interpreting that provision, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968), the Supreme Court held that attorneys' fees must be awarded "unless special circumstances would render such an award unjust." Rejecting "good faith" as a defense, the Court reasoned that,

> If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice, 1352 (1966 ed.).

390 U.S. at 403 *n.* 4, 88 S.Ct. at 966 *n.* 4.

Newman has been applied by this court in *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970), where we concluded in another Title II action that neither the fact that a non-frivolous controversy existed nor the fact that the defendants acted in good

[2]Section 718 requires a threshold finding by the trial court that the proceedings were necessary to enforce compliance.

[3]In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs, and the United States shall be liable for costs the same as a private person, 42 U.S.C. § 2000a-3(b).

faith constituted the "special circumstances" contemplated by the Supreme Court. Thus, the standard applied under the statutory language in Title II actions diverged somewhat from the standard applied in school desegregation cases by this Court and other Circuit Courts which have considered the question. *See Brewer v. School Board of City of Norfolk, Virginia*, 456 F.2d 943, 949 (4th Cir.), *cert. denied* ___ .US. ___, 92 S.Ct. 1778, ... L.Ed2d ..... (1972). That Congress chose to structure Section 718 in language similar to that interpreted by the Supreme Court in *Newman* is a strong factor indicating that the two statutes should be interpreted *pari passu.*

Moreover, in addition to the similarity of the language used in Section 718 and its Title II analogue, the two provisions share a common *raison d'etre.* The plaintiffs in school cases are "private attorneys general" vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose — "to encourage individuals injured by racial discrimination to seek judicial relief . . ." *See Newman, supra,* 390 U.S. at 402, 88 S.Ct. at 966. We hold that if the court finds that the proceedings were necessary to bring about compliance, then Section 718 must be applied in accordance with the test enunciated in *Newman, i.e.,* in the absence of special circumstances attorneys' fees are to be awarded.

We decline to apply § 718 retroactively to the expenses incurred during the years of litigation prior to its enactment. This interpretation of the neutral lan-

guage of the statute is compelled both by the long-established presumption against retrospective application in the absence of a clear legislative intent and the clear precedents of this Circuit governing such litigation. School desegregation litigation has produced precedents which have been somewhat less than clear and explicit. Even when plaintiff and defendant were in agreement about the end to be reached, the means and the timing which would accomplish the goal often remained in bitter dispute. There was a necessity that the demands of the aggrieved plaintiffs be harmonized with legitimate educational interests of the school authorities and the community as a whole in the smooth and uneventful transition to a unitary school system. Many school districts have been litigating in this field filled with fast changing precedents and guidelines for a number of years; to apply this statute retroactively would place a wholly unexpected and unwarranted burden on these districts who have done no more than litigate what they, in good faith, believed to be demands which exceeded the Constitution's demand.[4]

Under these circumstances, a retroactive application of this statute would punish school boards for good faith action in seeking the guidance of the courts to determine what was required of them. Furthermore, retroactive awards of attorneys' fees for these past years of litigation would not serve the purpose of encouraging future legal challenges of segregated school systems. The inconclusive legislative history of Section

[4]Of course if the litigation could be characterized as unreasonable and obdurately obstinate, then by the same reasoning as advanced in *Newman, supra*, Section 718 would be surplusage under the existing rule of *Williams* and *Horton*.

718 furnishes no basis for inferring that Congress intended this provision to be given such a sweeping effect.

Thus, as to legal services awarded prior to July 1, 1972, the effective date of the Education Amendments Act of 1972, we hold that the award of attorneys' fees is to be governed by the standard enunciated by this court in *Williams* and *Horton*. Awards for legal services rendered on or after that date are governed by the statute.

The brief order of the trial court indicates that the single standard applied there was the one set out in *Bradley v. School Board of City of Richmond, Virginia*, 53 F.R.D. 28 (E.D. Va. 1971). Without deciding whether the standard enunciated in *Bradley* is consistent with Section 718, we rule that *Bradley*, at lease insofar as it holds that full and appropriate relief in school desegregation cases must include the award of expenses of litigation, 53 F.R.D. at 41, is inconsistent with the standard of this circuit applicable to legal services rendered prior to the effective date of the statute. Since the record indicates that some part of the legal services in this case may have been rendered prior to that date, we vacate the award of attorneys' fees and remand to the district court for further proceedings in accord herewith.

Section 718 expressly allows attorneys' fee awards only upon "the entry of a final order." The most suitable test for such finality exists in the body of law which has been developed in determining appealability under 28 U.S.C.A. § 1291. In general, this means a

judgment or order which ends the litigation on the merits and comprehends only the execution of the court's decree. *See C. Wright, Federal Courts* § 101 (2d ed. 1970). Since most school cases involve relief of an injunctive nature which must prove its efficacy over a period of time, it is obvious that many significant and appealable decrees will occur in the course of litigation which should not qualify as final in the sense of determining the issues in controversy. The ultimate approach to finality must be an individual and pragmatic one. Such a matter should be committed to the determination of the trial court.

For the district court's guidance at the appropriate time, we now hold that plaintiffs are entitled to a reasonable attorneys' fee for prosecuting this present appeal, in the amount of 1,250 dollars. *See Meeks v. State Farm Mut. Ins. Co.*, ... F.2d ..... (5th Cir. 1972) [No. 71-2137, No. 71-2293, May 22, 1972]; *Campbell v. Green*, 112 F.2d 143 (5th Cir. 1940).

AFFIRMED in part,
VACATED in part and
REMANDED.

A true copy
Test: EWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
/s/Maryette K. Farley
Deputy

New Orleans, Louisiana DEC 14 1972

[SEAL]

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-5055-D

PRINCESS RANOLA JOHNSON, ET AL,
Plaintiffs

v.

M. BROWNING COMBS, ET AL,
Defendants

MEMORANDUM OPINION AND ORDER

Plaintiffs are black school children living in the Grand Prairie Independent School District. In this suit they challenge the District's teacher employment and assignment practices and the assignment of black students. Jurisdiction is predicated on 28 U.S.C. §§ 1981, 1983, 2000 c-8 and 2000 d. Trial was to the court. After hearing the evidence, the court concludes that the District's teacher employment and assignment practices are not racially discriminatory. Further, though the District does not operate a racially segregated school at the middle and high school levels, the court finds that the District does maintain a segregated school system at the elementary school level.

The School District

The Grand Prairie Independent School District is located in Dallas County, Texas. The District has grown rapidly, as evidenced by the fact that the number of students has increased from 1700 to 11,300 in the past twenty-three years. There are presently two high schools, four middle schools, and thirteen elementary schools in the District. Busing is provided for students who live more than two miles from their assigned schools. During the 1971-72 school year approximately 5,000 students, more than 40% of the total school population, were bussed.

Teacher Employment and Assignment

Plaintiffs' first contention is that the District discriminates in its teacher employment and assignment practices. Though the District employs few black teachers, the evidence reveals that there is keen competition for the services of black teachers and that few black teachers have sought employment with the District. The court finds that the District does not racially discriminate in its teacher hiring practices. Nor does the court find racial discriminatory practices in the assignment of those teachers who are employed by the District.

Middle and High Schools

The percentage of black students attending the four middle schools during the 1971-72 school year was 16.03%, 2.24%, 1.79% and 0.35%. One of the two high schools had 5.88% black students; the other had 1.74%

black students. The court concludes that the District does not operate a racially segregated school system at the middle and high school levels.

Elementary Schools

Plaintiffs seriously challenge the racial composition of only one elementary school, Dalworth. Prior to the 1965-66 school year Dalworth school was a 12 grade school and all black students living in the District were assigned there. At the beginning of the 1965-66 school year the District implemented a plan whereby black students in the 10th, 11th and 12 grades were assigned from Dalworth to one of the two high schools. At the beginning of the 1967-68 school year the District assigned black students in the 7th, 8th and 9th grades from Dalworth to one of the four middle schools. These assignments left Dalworth a predominately black elementary school.

The only attempts the District has made to desegregate Dalworth have been the implementation of a freedom of choice plan,[1] and the assignment of elementary students to neighborhood schools. These two plans have been in operation for five years, but Dalworth has continued to remain a one-race school. In January of 1972 Dalworth had a total regular enrollment of 304 black and 2 non-black students, which resulted in the population of Dalworth being more than

[1]This plan permits members of a race who are in a majority in any school to transfer to a school where their race is in a minority. Under this plan few black students have transferred from Dalworth and no students of other races have transferred to Dalworth.

99% black.[2] The regularly enrolled black students at Dalworth constituted 87% of the District's total black elementary students. In contrast, 7 elementary schools had less than 5% black students, and 5 elementary schools had no black students. The court finds that the District's plans have not integrated Dalworth and the District operates a dual school system at the elementary grade levels.

As a defense, the District maintains that residential patterns are responsible for Dalworth's racial composition. The District says that the Dalworth attendance zone has always consisted of predominately black residents, and since 1965, when integration plans were first implemented, those moving into the Dalworth attendance zone have continued to be predominately black. The District urges that it did desegregate Dalworth in 1965, and that subsequent residential patterns are responsible for the school's present racial composition. This argument might have merit if Dalworth had ever been truly desegregated, but Dalworth has never been racially integrated and residential patterns can be no defense to the existence of one race schools in a system which has never been operated in a unitary manner. *Flax v. Potts*, ___ F.2d ___, (5th Cir. July 14, 1972, No. 71-2715); *Cisneros v. Corpus Christi Independent School District*, ___ F.

[2]Not included in these figures are students enrolled in a "special education" program operated by the District. This program provides special aid to students requiring such assistance. Students enrolled in this program use regular school facilities but are instructed separately from other students. At this time the program is conducted at Dalworth, where 5 black and 16 white students are enrolled. If the special education students are included, Dalworth's student body is still over 90% black.

2d ___, (5th Cir. August 2, 1972, No. 71-2397). The District's argument is therefore rejected.

The Remedy

The most prevalent remedy used in the dismantling of dual school system is that in which two or more school attendance zones are treated as one for the purposes of integration. This type of plan is often referred to as clustering of schools.

There are two basic kinds of clusters. In a grade assignment cluster all students of a certain grade are assigned to one school. Under this plan, students in the elementary grades may attend neighborhood schools during those years in which they are in grade levels assigned to schools near their homes. On the other hand, elementary students in the same family will probably attend different schools. Further, children will not be able to attend one school during their elementary school years.

In a geographical assignment cluster students are assigned by family to schools based on the racial percentages that exist within the cluster zone. This can be accomplished by either redrawing attendance zones or by assigning students alphabetically by race. Geographical assignment has the advantage that each school has a full complement of grades and that all children in a family will attend the same school during their elementary years. However, the school to which students are assigned may not be the closest to that student's home and the benefits of a neighborhood school may be lost.

This court feels that in attempting to achieve a racial balance of students through a cluster plan it is desirable that the number of schools to be included in the cluster be kept to a minimum. The greater the number of schools the greater will be the number of students to be reassigned. Transportation is an inevitable requirement in such reassignments and the amount of transportation required is, therefore, directly related to the number of schools involved.

Sam Houston and James Bowie are elementary schools located adjacent to the Dalworth attendance zone. These schools have a low percentage of black students: during the 1971-72 school year Houston had 27 black students (4.79%) and Bowie had none. The prospective enrollment for the 1972-73 school year for Dalworth is 307, Houston 530, and Bowie 526, making a total prospective enrollment of 1,363. Approximately 338 (24.80%) of the student body of these three schools will be black.

After considering the evidence, the court is of the opinion that the present Dalworth attendance zone should be clustered with the present Houston and Bowie attendance zones and that the students residing within this cluster zone should be assigned geographically to one of these three schools. The court is also of the opinion that the District should determine whether assignment of students is to be accomplished by redrawing attendance zones or by alphabetical assignment.

The court notes that Congress has recently enacted legislation requiring that school desegregation orders

which call for busing of students be stayed until the parties exhaust all appeals. *Education Amendments of 1972*, Public Law 92-318, §803 (June 23, 1972), 41 U.S. L.W. 47 (July 18, 1972). This court is also aware of other legislation now pending in Congress relating to school desegregation orders and busing of students which may become law within the near future. Under these circumstances the court feels that at this time the remedy above prescribed should be stayed in accordance with the recent mandate of Congress or until further orders of this court.

Finally, the court would like to commend the District and its superintendent for their efforts to convert from a dual to a unitary school system. This court is fully satisfied that the plans adopted for the middle and high school level of education meet the constitutional requirements of a unitary school system for these grades. It is only at the elementary level that this court can find fault, and this at only one school.

For the reasons above set forth it is ORDERED and DIRECTED that:

(1) Students in grades one through six residing in the present Dalworth elementary school attendance zone be clustered with students in grades one through six residing in the present Sam Houston and James Bowie elementary attendance zones. Students shall be geographically assigned to one of the three clustered schools in such a manner that the percentage of black students in each grade in each school shall approximate the percentage of black students in each grade in the cluster zone. The assignment of students to

achieve racial balance in each grade shall be at the discretion of the District by either drawing new school attendance zones or by alphabetical assignment.

(2) Transportation shall be provided by the District with pickup and discharge points to be located as near as practicable to student residences.

(3) The present majority to minority student transfer plan shall be maintained so that black students within the cluster zone who attend other schools may continue to do so.

(4) The District shall file with this court 60 days following the beginning of each school year a report showing the number and percentage of black students and the number and percentage of students of other races in each grade in each school within the cluster zone. The report shall also contain the number and percentage of black elementary students and the number and percentage of elementary students of other races in each grade in the cluster zone.

(5) To the end that a unitary school system shall be maintained this court retains jurisdiction of this case.

(6) This order shall be stayed until all appeals in connection with this cause have been fully exhausted or, in the event no appeal is taken, until the time for such appeal has expired, or until further order of this court.

Dated this 22nd day of August, 1972.

/s/Robert M. Hill
United States District Judge

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3456

SYLVESTER WEAVER, et al.,
Plaintiffs-Appellants,

versus

BOARD OF PUBLIC INSTRUCTION OF
BREVARD COUNTY, FLORIDA,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(September 6, 1972)

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

GODBOLD, Circuit Judge: The appellee School Board operates 67 schools in a system 90% white -10% black. Following a hearing conducted in August 1971 the District Court found the system to be unitary except for one school, Poinsett Elementary, located in the urban area of Cocoa, Florida. According to June, 1971 figures Poinsett was 96.97% black. The District Court required the Board to submit by September 15, 1971 a plan for the desegregation of Poinsett. The Board re-

sponded with a proposal to discontinue the use of the school as a regular elementary facility and to convert it to a special education center no later than January 26, 1972, housing a county-wide kindergarten program and a model demonstration school, to be attended on a rotating basis by students from throughout the county. Substantial bus transportation would be required, some of it over considerable distances. Pupils previously assigned to Poinsett would be assigned to these six predominantly white elementary schools.

School	*Approx. distance from Poinsett*
Golfview	1.2 miles
Cambridge	2.2 "
Mila	3.0 "
Anderson	3.5 "
Tropical	4.2 "
Audubon	5.6 "

A hearing was conducted on the Board plan on October 14, but on October 22 the Board asked for a delay and an opportunity to present an alternate plan. The alternate, presented October 29, consisted solely of majority-to-minority transfer from Poinsett to any of the above six predominantly white schools, with guaranteed space available and bus transportation for students living more than two miles from Poinsett. The court approved this alternate, with minor modifications, on November 11. Plaintiffs appealed.

At the direction of this court the Board has filed supplemental data, as of March 1972, revealing that 100 black pupils from Poinsett availed themselves of

majority-to-minority transfers. Nevertheless the racial composition of Poinsett as of March, 1972, remained 97% black — 648 black pupils and 22 whites. The Board also reported that it proposed to continue the same use of the Poinsett school in 1972-73, and estimated that the racial composition would be 670 black, 20 white, or still 97% black.

It is obvious that this arrangement for Poinsett does not meet standards for school desegregation. This one school, substantially all-black and continuing to be such, is in close proximity to predominantly white elementary schools, the same schools to which the Board, in its original plan of closing Poinsett, proposed that *all* Poinsett students be transferred, with transportation furnished beyond two miles.

Majority-to-minority transfer is a valuable tool for school desegregation, ordinarily employed in conjunction with other means. In this instance, with other means available whose legal validity is not subject to serious question, the employment of majority-to-minority transfer as the sole means of desegregating Poinsett, will not stand scrutiny.

In *United States v. Texas Education Agency*, ____ F.2d ____ (5th Cir., August 2, 1972) (en banc), seven of fourteen participating members of this court joined in the view (slip op. p. 89) that pending further Supreme Court action "we should hold in abeyance all those pupil assignment cases which cannot be solved by well recognized tools whose validity is beyond question, such as pairing contiguous schools, majority to minority transfers, and minimal additional transpor-

tation of students." This is not such a case. The contiguous elementary schools are predominantly white and are not far distant, presenting the traditional context in which pairing is employed.

The case must be reversed and remanded to the District Court for further proceedings consistent with the remedy directed in *Cisneros v. Corpus Christi Independent School District*, ... F.2d ..... (5th Cir. August 2, 1972) (en banc).

REVERSED and REMANDED.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1187

M. BROWNING COMBS, ET AL, *Petitioners*

v.

PRINCESS RANOLA JOHNSON, ET AL, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners' Reply Brief

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PETITIONER'S REPLY BRIEF

Respondents' brief in opposition to Petitioners' Petition for writ of certiorari highlights one critical error of law by the trial court and the Court of Civil Appeals for the Fifth Circuit, i.e. the error of applying an "irrefutable presumption of discrimination" evidentiary standard to a school district with the history of a dual system that had one primarily black elementary school.

Respondents in their opposing brief rely on *Flax v. Potts*, 464 F2d 865 (5th Cir., 1972) certiorari denied, ... U.S. ....., 34 L.Ed.2d 299 (1973), as follows: "The court of appeals found that in light of the history of state-imposed segregation as it affects a school district,

the existence of one-race schools is presumptively discriminatory" (Respondents' Opposition Brief, p. 6).

The trial court felt bound by the law of the Fifth Circuit under *Cisneros v. Corpus Christi Independent School District*, 467 F2d 142 (5th Cir., 1972) and *Flax*, that the existence of a primarily one-race school in a school district with a history of a dual system, created an irrefutable presumption that the offending school was the result of de jure segregation, and, therefore, the school district, without regard to the evidence, could not be "unitary." The district court's error in following the "irrefutable presumption of discrimination" standard is clear from the following language from the district court opinion:

> The District urges that it did desegregate Dalworth in 1965, and that subsequent residential patterns are responsible for the school's present racial composition. This argument might have merit if Dalworth had ever been truly desegregated, but Dalworth has never been racially integrated and residential patterns can be no defense to the existence of one-race schools in a system which has never been operated in a unitary manner. Flax v. Potts, ... F.2d ..... (5th Cir., July 14, 1972, No. 71-2715); Cisneros v. Corpus Christi Independent School District, ... F.2d ..... (5th Cir., August 2, 1972, No. 71-2397). The District's argument is therefore rejected.

The application of the "irrefutable presumption of discrimination" standard is readily apparent from the record in the case which reflects that contrary to the overwhelming evidence of school compliance with Con-

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stitutional desegregation standards, the respondents failed to introduce a shred or a scintilla of direct evidence as to discrimination on the part of the school district.

UNIFORM RULES OF EVIDENCE OF RACIAL DISCRIMINATION [20 U.S.C. §1655]

Public Law 92-318, Section 805, 20 U.S.C. §1655 (The Education Amendments of 1972 under which Respondents claim attorneys' fees pursuant to §718) provides:

> Sec. 805. The rules of evidence required to prove that state or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

If the above legislation be constitutional, the "irrefutable presumption of discrimination" standard applied by the trial court and the Court of Appeals for the Fifth Circuit, and peculiar to the Fifth Circuit, was wrong, certiorari should be granted, the case reversed and no attorneys' fees allowed. Indeed, the above legislation does away with presumptions sought to be applied regionally. The above legislation became effective July 1, 1972. The decision of the trial court in this case was rendered on August 22, 1972. *Flax* and *Cisneros* were decided by the Court of Appeals for the Fifth Circuit without reference to the Education Amendments of 1972.

The "irrefutable presumption of discrimination"

standard applied by the trial court was erroneous with or without regard to the above legislation.

The intent of Congress that there shall not be one law and standard of evidence for the South, and one law for the rest of the country are set forth in the above and other sections of the Education Amendments of 1972, which are hereinafter set forth, together with the codification reference. These sections of Public Law 92-318 which also militate against Respondents' position and the grant of attorneys' fees herein are Sections 719, 20 U.S.C. §1618; Section 801, 20 U.S.C. §1651; Section 802, 20 U.S.C. §1652; and Section 806, 20 U.S.C. §1656:

NEIGHBORHOOD SCHOOLS
[20 U.S.C. §1618]

Sec. 719. Nothing in this title shall be construed as requiring any local educational agency which assigns students to schools on the basis of geographic attendance areas drawn on a racially nondiscriminatory basis to adopt any other method of student assignment.

PROHIBITION AGAINST ASSIGNMENT OR TRANSPORTATION OF STUDENTS TO OVERCOME RACIAL IMBALANCE
[20 U.S.C. §1651]

Sec. 801. No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

PROHIBITION AGAINST USE OF APPROPRIATED FUNDS FOR BUSING [20 U.S.C. §1652]

Sec. 802(a). No funds appropriated for the purpose of carrying out any applicable program may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system, except on the express written voluntary request of appropriate local school officials. No such funds shall be made available for transportation when the time or distance of travel is so great as to risk the health of the children or significantly impinge on the educational process of such children, or where the educational opportunities available at the school to which it is proposed that any such student be transported will be substantially inferior to those opportunities offered at the school to which such student would otherwise be assigned under a nondiscriminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

(b) No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education), the Department of Justice, or any other Federal agency shall, by rule, regulation, order, guideline, or otherwise (1) urge, persuade, induce, or require any local education agency, or any private nonprofit agency,

institution, or organization to use any funds derived from any State or local sources for any purpose, unless constitutionally required, for which Federal funds appropriated to carry out any applicable program may not be used, as provided in this section, or (2) condition the receipt of Federal funds under any Federal program upon any action by any State or local public officer or employee which would be prohibited by clause (1) on the part of a Federal officer or employee. No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education) or any other Federal agency shall urge, persuade, induce, or require any local education agency to undertake transportation of any student where the time or distance of travel is so great as to risk the health of the child or significantly impinge on his or her educational process; or where the educational opportunities available at the school to which it is proposed that such student be transported will be substantially inferior to those offered at the school to which such student would otherwise be assigned under a nondiscriminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

(c) An applicable program means a program to which the General Education Provisions Act applies.

APPLICATION OF PROVISO OF SECTION 407(a) OF THE CIVIL RIGHTS ACT OF 1964 TO THE ENTIRE UNITED STATES [20 U.S.C. §1656]

Sec. 806. The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

In reply to Respondents' statement of the facts, it should be noted that in 1965 (D. Ex. 9, R. 198) and again in 1968 (D. Ex. 10, R. 199), H.E.W. certified the Grand Prairie Independent School District as being in compliance with the Civil Rights Act of 1964. At least eighty percent of the school children attending the Dalworth Elementary School moved into the Dalworth attendance zone after 1964. The Dalworth Elementary School faculty was 82.35% white and

17.65% black (P. Ex. 8, R. 68, 69, 75). The overall student racial ratio in Dalworth, including special education students, had changed from 100% black to 86.4% black, 13.6% white (D. Ex. 15, R. 208).

CONCLUSION

There is a conflict in the decisions of the other Courts of Appeal and the law as written by Congress and the irrefutable presumption of discrimination standard applied by the lower courts in this case.

The standard of law applied by the trial court and the Appellate Court being clearly erroneous and the necessity that the law of the United States be applied uniformly demand review of the action below in order that justice be done.

Petitioners pray that certiorari be granted, the holding of the lower courts be reversed, that Respondents be denied attorneys' fees, and that costs herein be assessed against Respondents. Petitioners further suggest that on the record, summary reversal is in order.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1187

M. BROWNING COMBS, ET AL, *Petitioners*

v.

PRINCESS RANOLA JOHNSON, ET AL, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petition for Rehearing

Petitioners herein respectfully move this Court for an Order (1) vacating its denial of the petition for Writ of Certiorari, entered on June 25, 1973, and (2) granting the Petition. As grounds for their Motion, Petitioners state the following:

1. The decisions of the lower courts and the denial of Certiorari in this case are contrary to *Keyes v. School District No. 1, Denver, Co.*, 41 L.W. 5002, decided June 21, 1973.

The *Keyes* standard, if applied to the Grand Prairie Independent School District, requires summary disposition in favor of the school district because the trial court found as a fact that the "intent" of the school district had been to operate a unitary system throughout the school district and that it did so, except for

one neighborhood elementary school with a racially imbalanced student body only. Such finding of fact, under the *Keyes* rationale, created a presumption the school district was operating a unitary system that was not rebutted by the plaintiffs.

The exact language of the District Court opinion is as follows:

> Finally, the Court would like to commend the District and its Superintendent for their efforts to convert from a dual to a unitary school system. This Court is fully satisfied that the plans adopted for the middle and high school level of education meet the constitutional requirements of a unitary school system for these grades. It is only at the elementary level that this Court can find fault, and this at only one school. (Dist.Ct. Opinion, Pet. for Writ of Certiorari, P. 30)

The Dalworth Elementary School, of which complaint was made, was not a segregated school under the *Keyes* standard, the Court therein having held:

> In addition to the racial and ethnic composition of a school's student body, other factors such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school must be taken into consideration.

Had the "other factors" mentioned in *Keyes* been taken into consideration by the District Court with regard to the Dalworth school, the only finding possible under that evidence would have been that Dalworth was not a segregated school.

Keyes held that the differentiating factor between de jure segregation and de facto segregation is purpose or intent to segregate. The requisite finding of intent by the school board to segregate was not made by the trial court in this case.

Swann[1] and *Keyes* each create presumptions that may exist in school cases. *Keyes* held that intentionally segregative school board actions in a meaningful portion of a school system create a presumption that the school district operates a dual system, but that such presumption is rebuttable. *Swann* held that in a system with a history of segregation where there are schools that are substantially disproportionate in their racial composition, there is a presumption that the school district operates a dual system, but the lower courts held in this case that such presumption was conclusive. If the lower courts' holdings are sustained, then a different evidentiary standard obtains for the South, contrary to Public Law 92-318, Section 805, 20 U.S.C. §1655 (The Education Amendments of 1972) which provides:

> Sec. 805. The rules of evidence required to prove that state or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

According to Wigmore, there cannot be such a thing as a "Conclusive Presumption".

> In strictness, there cannot be such a thing as a "conclusive presumption". Wherever from one

[1]Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)

> fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and *to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence.* IX Wigmore, Evidence, p. 292, §2492 (3d ed 1940) (Emphasis added)

Contrary to Wigmore and the rationale of *Keyes*, the "Conclusive Presumption" is alive and well in this case under the lower courts' interpretation of *Swann*.

The lower courts in this case erroneously made the "Presumption" of *Swann* conclusive and converted such presumption into a rule of substantive law whereby once a finding of student racial imbalance in a single neighborhood elementary school was made, the school district was denied unitary status and became subject to federal court control.

Petitioners respectfully submit that upon evidence by the school board that it had (a) integrated faculties and administration; (b) scrupulously assured equality of facilities, instruction and curricula opportunities throughout the district; (c) utilized their authority to draw attendance zones to provide integration; and (d) located new schools, closed old ones and determined the size and grade categories with full integration in mind; that any presumption that the

Dalworth Elementary School precluded the Grand Prairie Independent School District from unitary status disappeared, and when plaintiffs' failed to produce evidence as to discrimination, their case failed.

Such is consistent with *Keyes* and the law of presumptions according to Wigmore:

> The evidentiary facts, free from any rule of law as to the duty of producing evidence, may tend to opposite inferences, which may be said to conflict. But the rule of law which prescribes this duty of production either is or is not at a given time upon a given party. *If it is, and he removes it by producing contrary evidence, then that presumption, as a rule of law, is satisfied and disappears;* IX Wigmore, Evidence 292 §2493 (3d ed. 1940) (Emphasis added)

Keyes held that at the point where an intentionally segregated policy is practiced in a meaningful or significant segment of a school system, it is fair to require the school authorities to bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent. Application of this rationale requires that where an intentionally integrative policy is practiced in a meaningful or significant segment of a school system, it is fair to require those alleging discrimination to bear the burden of producing evidence of discrimination. Under *Keyes* the existence of a single neighborhood elementary school whose only offense was a racially imbalanced student body, does not, without other factors, create a segregated school,

much less raise a conclusive presumption that is dispositive of the case.

Keyes further held that:

> ". . . a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions."

The other side of the coin would be that a finding of intentional integration in a major portion of a school system creates a presumption that one instance of racial imbalance within the system is adventitious. It establishes a prima facie case of operation of a unitary system by school authorities and shifts to those alleging discrimination the burden of proving that segregated schools within the system are the result of intentionally segregative actions.

The law of *Keyes* being that

> . . . there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system;

then fairness dictates that where school authorities have effectuated an intentionally integrative policy

throughout the school system, similar permissible considerations have motivated their actions in other areas of the sytem.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari and specifically for the reason that under the criteria of *Keyes* the Dalworth Elementary School was not a segregated school, Petitioners pray that this Court grant rehearing of the order of denial, vacate the order, grant the Petition and review the Judgment and opinion below. Petitioners suggest that on the record, summary reversal is in order.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

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